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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 RAFAEL RIVERA,
7
8 Plaintiff,

9 v.
10
11 WILLIAM J MCGAFFEY, ROZELL
12 TOWNSEND, LINDA ALLEN,
13 DUNINGTON, K ARLOW, DOUG
14 WADDINGTON,
15
16 Defendant.

17 CASE NO. C11-5942-RJB-KLS

18 ORDER DENYING MOTION TO
19 AMEND COMPLAINT

20 Before the Court is Plaintiff's Motion for Leave to File Amended Complaint. ECF No.

21 37. For the reasons set forth herein, the Court finds that the motion should be denied.

22 BACKGROUND

23 On December 6, 2011, Plaintiff filed a Civil Rights Complaint by a Prisoner under 42
24 U.S.C. § 1983, alleging that his First Amendment right to redress grievances was violated when
he was infracted for inciting or participating in a group demonstration at the Washington
Corrections Center (WCC); and, he alleges that the resulting guilty finding and transfer to
Coyote Ridge Corrections Center (CRCC) were retaliatory and a violation of his due process
rights. ECF No. 5. Under the "relief sought" portion of his complaint, Plaintiff included the
following handwritten statement: "Plaintiff has also been suffering from constant severe pain in
the neck, shoulder and arms since transport to Coyote Ridge." *Id.*, at 14. He included no factual
allegations nor did he assert any constitutional claim related to this statement in the body of the
complaint.

1 In his Motion, Plaintiff seeks permission to add a personal injury claim against all the
 2 Defendants, who are current and former employees of the Washington State Department of
 3 Corrections at WCC, based on an injury that Mr. Rivera alleges he sustained during the transport
 4 bus ride from WCC to CRCC. Plaintiff claims that the “injury was only verified after filing and
 5 continued complaints by Plaintiff to CRCC Medical beginning in September of 2011.” ECF No.
 6 37, at 2.

7 In December 2011, Plaintiff filed a tort claim against the State of Washington for a neck
 8 injury received during transport from WCC to CRCC. ECF No. 37, at 31. The claim was
 9 declined based on a review that “does not support a finding upon which to base any payment, as
 10 required under Chapter 4.92 RCW. *Id.*

11 DISCUSSION

12 A party may amend its complaint with the court’s leave, and leave shall be freely given
 13 where “justice so requires.” *Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d
 14 991, 1010 (9th Cir.2008) (citing to Fed. R. Civ. P. 15). Although the courts apply this policy
 15 liberally, leave to amend will not be granted where an amendment would be futile. *Id.* (citing
 16 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987)); *Johnson v. American*
 17 *Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir.1987) (“courts have discretion to deny leave to amend a
 18 complaint for ‘futility,’ and futility includes the inevitability of a claim’s defeat on summary
 19 judgment.”); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986) (“any
 20 amendment would have been futile in that it could be defeated on a motion for summary
 21 judgment”).

22 Although leave to amend pleadings may be granted regardless of the length of time of
 23 delay by the moving party, a Court is within its discretion to deny amending a complaint absent a
 24 showing of bad faith by the moving party or prejudice to the opposing party. *See United States*

1 | *v. Webb*, 655 F.2d 977 (9th Cir. 1981); *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir.
 2 | 1973).

3 Here, Plaintiff requests to add “an injury claim” to his § 1983 First Amendment
 4 retaliation complaint. He purports to sue all the named Defendants for a “Cervical Spine injury
 5 sustained during his transfer from the Washington Correction Center to the Coyote Ridge
 6 Corrections Center in March of 2010.” ECF No. 37. Plaintiff does not identify which
 7 Defendants were allegedly involved in the transfer, but appears to be claiming that because
 8 Defendants retaliated against him by transferring him and he was injured on the bus during the
 9 transfer, they are all liable.

10 To the extent it can be argued that Plaintiff’s injury claim did not “accrue” until after the
 11 filing of the original complaint, Fed.R.Civ.P. 15(d) arguably governs the inquiry. *Eid v. Alaska*
 12 *Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010); *See also Cabrera v. City of Huntington Park*,
 13 159 F.3d 374, 382 (1998) (“Rule 15(d) permits the filing of a supplemental pleading which
 14 introduces a cause of action not alleged in the original complaint and not in existence when the
 15 original complaint was filed.”) (quotation omitted). FRCP 15(d) provides as follows:

16 On motion and reasonable notice, the court may, on just terms, permit a party to
 17 serve a supplemental pleading setting out any transaction, occurrence, or event
 18 that happened after the date of the pleading to be supplemented. The court may
 19 permit supplementation even though the original pleading is defective in stating a
 20 claim or defense. The court may order that the opposing party plead to the
 21 supplemental pleading within a specified time.

22 Fed. R. Civ. P. 15(d). The purpose of CR 15(d) is to promote “judicial economy and
 23 convenience” by allowing a party to bring in claims related to its original claims that occurred
 24 after the party filed its last complaint. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988).
 25 However, “[w]hile leave to permit supplemental pleading is ‘favored,’ it cannot be used to
 26 introduce a ‘separate, distinct and new cause of action.’” *Planned Parenthood of Southern*

1 1 *Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir.1997); *see also* 6A Charles Alan Wright, Arthur R.
2 2 Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil 2D § 1509 (1990) (noting that
3 3 leave to file a supplemental pleading will be denied where “the supplemental pleading could be
4 4 the subject of a separate action”).

5 The threshold consideration for the district court is whether “the supplemental facts
6 connect [the supplemental pleading] to the original pleading.” *Weeks v. New York State (Div. of*
7 *Parole)*, 273 F.3d 76, 88 (2nd Cir.2001). Even if the district court determines that a motion to
8 supplement meets the threshold consideration, it may still deny the motion if it finds undue
9 delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed
10 pleading, or futility. *Id.*

11 Essentially, Plaintiff seeks to add a state personal injury claim to his First Amendment
12 retaliation claim. While this Court could consider such a claim if associated with a jurisdictional
13 federal claim (such as a § 1983 Eighth Amendment claim and a state tort medical negligence
14 claim), Plaintiff does not allege a violation of the Eighth Amendment. He does not allege that
15 any of the Defendants were involved in the injury. In fact, he does not describe at all what
16 occurred on the bus ride to cause a neck injury. The medical reports attached to Plaintiff’s motion
17 show an absence of his history or knowledge of a precipitating event. The reports reflect only that
18 from September of 2011, medical staff treated Plaintiff’s neck condition and that such treatment
19 included surgery in August 2012. However, there is no evidence that the injury was caused by a bus
20 transfer. *See also* Declaration of Greg Pressel, Senior Tort Investigator, State Department of
21 Enterprise Services – Office of Risk Management (typographical error in report; the basis for the
22 state’s denial of tort claim was that doctor actually concluded: “I don’t think that based on the
23 documentation in the chart and the lapse in time between his transfer and when Mr. Rivera presented
24 to medical it would be reasonable to link his transport to his current injury.”) ECF No. 38, Exhibit 1.

1 Moreover, the parties and evidence of retaliation for use of the grievance system are
2 distinct from whatever may have happened on the bus. The latter would likely include lay
3 witnesses with their observations of what occurred on the bus, expert medical testimony on
4 causation, and perhaps experts on any mechanical malfunction of the bus. The passage of the
5 Civil Rights Act was not intended to federalize state tort law. *McCarthy v. Mayo*, 827 F.2d
6 1310, 1315 (9th Cir. 1987). If Plaintiff is making a state tort claim, it would be a separate claim
7 with separate defendants and it belongs in State court.

8 Based on the allegations and attachments to Plaintiff's motion, Plaintiff has failed to state
9 a cause of action against the Defendants. Even if it can be assumed that Plaintiff could properly
10 plead an injury claim against the Defendants in this case, the claim would be a separate, distinct,
11 and new cause of action against persons who may not be parties to this action. Therefore, the
12 claim, if any, should be the subject of a separate action.

13 Accordingly, it is **ORDERED**:

14 (1) Plaintiff's Motion for Leave to File Amended Complaint (ECF No. 37) is

15 **DENIED**.

16 (2) The Clerk shall send a copy of this Order to Plaintiff and counsel for Defendants.

17 DATED this 2nd day of January, 2013.



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19 Karen L. Strombom
20 United States Magistrate Judge
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